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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON LEE SCHMIDT, Defendant and Appellant.	E061429 (Super.Ct.No. SWF1203104) OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton, Judge. Affirmed.

Alan S. Yockelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

The dead body of Leopoldo Navarrete was found in a homeless encampment. Witnesses who lived in the encampment testified that defendant Jason Lee Schmidt told

them that he had killed someone. After defendant was arrested, he told the police that he had had an encounter with Navarrete in which Navarrete admitted being a child molester; Navarrete followed him, would not leave him alone, and grabbed his shoulder, so he hit Navarrete in the head with a rock. At trial, he gave a similar account; however, he added that he was afraid that Navarrete would harm him, so he hit Navarrete in the head with the rock in self-defense.

After a jury trial, defendant was found guilty on one count of second degree murder (Pen. Code, § 187, subd. (a)),[1] with an enhancement for personally using a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)(1)), and one count of resisting arrest (Pen. Code, § 148, subd. (a)(1)). In a bifurcated proceeding, after defendant waived a jury trial, the trial court found one "strike" prior allegation true. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) Defendant was sentenced to a total of 31 years to life in prison.

Defendant now contends:

1. The trial court erred by failing to instruct that both self-defense and imperfect self-defense can be premised on defense against a forcible sexual offense.

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[1] The information originally charged first degree murder. During deliberations, however, the jury indicated that it was deadlocked on the first degree murder charge. The trial court then granted the prosecution's motion to amend the information so as to charge second degree murder.

2. The trial court erred by ruling that the prosecution's failure to disclose a police report, which would have supported defendant's testimony that he did not set fire to the victim's car, was neither a *Brady*[2] violation nor grounds for a new trial.

3. Defense counsel rendered ineffective assistance by failing to object to assertedly prejudicial photos of the victim's dead body.

4. The imposition of separate and unstayed sentencing terms for the murder as well as on the deadly weapon enhancement constituted improper multiple punishment.

We find no prejudicial error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Prosecution Case*.

Surveillance video showed defendant at a Circle K in Lake Elsinore a little after 11:00 p.m. on June 8, 2012.[3] He was carrying a red gas can.

The Circle K was located near a homeless encampment known as the olive groves. Three witnesses — Kelly Spaulding, Patricia Powers, and Shaun Murillo — all lived in tents in the olive groves.

Between 12:30 and 1:30 a.m. on June 8-9, 2012, Spaulding heard someone outside her tent running and gasping for breath, as if he were "running for his life." He stopped,

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[2] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

[3] Surveillance video also showed Navarrete at the same Circle K, but earlier, at 9:50 p.m.

still gasping. Then she heard the sound of something solid hitting him repeatedly — "[p]robably wood or a rock on the head." Less than a minute later, she heard a man walking by her tent say, "You didn't fucking hear nothing. . . . You didn't fucking see nothing."

According to Murillo's statement to the police, one night, around 1:30 or 2:00 a.m., he saw defendant in a white four-door car, like a Ford Contour. Defendant was "babbling" — "talking in circles." He said he had just done some "work . . . that some people might be a fan of." He mentioned "scooping [someone's] brains out with [his] fingers like a spoon." He added, "It was my first kill of the year." At trial, however, Murillo denied most of this.

Powers testified that, on a date she could not specify, defendant came to her tent and asked her for a flashlight and a shovel. He also told her that he had killed someone.

On June 12, 2012, the police found Navarrete's car parked by the side of a road in Lake Elsinore.[4] The keys were in the ignition. There was a red gas can on the driver's side floorboard; it was similar to the one that defendant had had at the Circle K. There was fire damage to the floorboard, the upholstery, and the roof liner. The car smelled of gasoline and burnt plastic. There was a cane inside the car, and the car had a handicapped placard.

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[4] Photos of the car were introduced into evidence but have not been transmitted to us. Apparently they showed that the car was a white, four-door Toyota Corolla.

On or about June 14, 2012, Navarrete's daughter-in-law reported him as missing. He was 58 years old. The daughter-in-testified that he had knee injuries that made walking difficult; he had to use a cane and knee braces.

On July 19, 2012, Navarrete's body was found in the olive groves.[5] A few feet away, there was a rock, weighing two or three pounds, with suspected blood on it.

An autopsy revealed that Navarrete died as a result of "blunt impact injuries" to the head. The "whole skull" had multiple connecting fractures. One piece of the skull was missing, leaving brain matter visible. These injuries could have been cause by being hit in the head with a two or three-pound rock.

Defendant was arrested about a month after the body was found. As the police came in the front door, he resisted arrest by running out the back door.

Investigator Robert Cornett interviewed defendant. The interview lasted over two hours. The entire interview was audiorecorded, and a copy of the recording was provided to both the prosecution and the defense. However, the prosecution played only three short excerpts for the jury.

In the interview, defendant claimed that Navarrete confessed to molesting his own grandson and said he was sorry. Defendant told Navarrete to stop following him and to stop talking to him, but Navarrete would not leave him alone. Defendant "was getting madder and madder." Navarrete grabbed defendant's shoulder. Defendant picked up a

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[5] There were no leg braces on or near the body.

rock about the size of a softball and hit Navarrete with it, "probably ten times." Navarrete "slumped," but defendant continued to hit him. Defendant never told Investigator Cornett that he was acting in self-defense.

While defendant was in jail, witness Spaulding got a phone call from defendant's then-cellmate, Ricky Lee Compton, who was also a friend of hers. Compton told her, if she was subpoenaed in defendant's case, "don't show."

Defendant then got on the line. He said, "I'm in here for carrying a rock around." " . . . I guess you heard steps that night . . . . And then they came . . . [¶] . . . [¶] . . . asking questions about me." "So I hope I didn't scare ya and . . . make you uncomfortable by the noises . . . [.]"

Spaulding testified that she was "shocked" and "scared" as a result of the phone call and she was "not happy" to testify.

B. *The Defense Case*.

Defendant took the stand. He admitted prior convictions for burglary, possession of burglary tools, possession of a controlled substance, and transportation of methamphetamine.

Defendant testified that he met Navarrete for the first time on the night of June 8, 2012. Defendant was at a party at a friend's house when Navarrete showed up. Everybody there, including defendant and Navarrete, was using methamphetamine. Navarrete said he had run out of gas, so defendant went to the Circle K, got gas for him, and put it in his car.

The host of the party asked defendant to drive Navarrete home, so defendant did. As they were driving, however, Navarrete asked defendant to lend him money to buy methamphetamine, in exchange for some of the methamphetamine; defendant agreed. Defendant drove to the olive groves, intending to buy the methamphetamine from Shaun Murillo.

While they were driving, Navarrete started crying and saying that "he messed up" and he was sorry. When they arrived, they parked and started walking toward Murillo's tent. According to defendant, Navarrete had no trouble walking; defendant never noticed him having leg braces or a cane. Defendant also denied seeing a handicapped placard in Navarrete's car.

Meanwhile, as they got out, Navarrete volunteered, "I raped my six-year-old grandson."[6] Defendant testified: "He was high. He just wanted some affection. And he is so sorry and crying." Defendant was "freaked out" but not frightened. When Navarrete grew more "emotional and intense," defendant said "Fuck you. I'm out of here," and started to walk away.

Navarrete grabbed defendant's shoulder from behind and "yank[ed]." At the time, he outweighed defendant by 50 or 60 pounds. Defendant was "scared"; he had a "sick feeling." He threw a punch at Navarrete, but it "glanced off him." Navarrete "grabbed

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[6] One of Navarrete's daughters-in-law testified that he had no opportunity to molest his grandchildren. Also, as of 2012, all of Navarrete's grandchildren were under six, except for one grandson who was nine.

onto" defendant as they fell partway to the ground. Defendant felt around "for something to get the dude off me"; when he found "something," he started hitting Navarrete with it. He was aiming for Navarrete's head, but Navarrete put up his arm, so some of the blows landed on Navarrete's arm or shoulder. Defendant estimated that he hit Navarrete six or eight times; when Navarrete let go of him, he stopped.

Defendant claimed, "I wasn't trying to kill the dude. I was trying to get the dude off me . . . ." He thought Navarrete was trying to hurt him. In his view, if he had not defended himself, he would be dead. However, he also testified, "I don't know what his intentions were . . . . I don't know if he wanted some affection. I don't know if he wanted to do me harm in some other way . . . ."

On cross-examination, defendant also testified:

"Q. You didn't think he was going to kill you, did you?

"A. Like I said, . . . I don't know that dude from anybody else. After that dude was talking about how he just got done taking from a little boy, his grandson, who am I to say he is not trying to take some booty from me?"

Defendant admitted telling Murillo that he had killed someone who "jumped" him. However, it was Murillo who suggested getting a shovel and a flashlight.

Defendant also admitted leaving Navarrete's car where the police later found it, after it ran out of gas. However, he denied setting fire to it.

Defendant insisted that, when Investigator Cornett interviewed him, he did say that Navarrete was trying to hurt or to kill him and that he acted in self-defense.

II

FAILURE TO INSTRUCT ON SELF-DEFENSE AND IMPERFECT SELF-DEFENSE BASED ON A FORCIBLE SEXUAL OFFENSE

Defendant contends that the trial court erred by failing to instruct that both self-defense and imperfect self-defense can be premised on a fear of "rape."[7]

A. *Additional Factual and Procedural Background*.

The trial court instructed the jury on self-defense, using CALCRIM No. 505, including that:

"The defendant is not guilty of murder or voluntary manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if:

"One, the defendant reasonably believed that he was in *imminent danger of being killed or suffering great bodily injury*;

"Two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against the danger; and

"Three, the defendant used no more force than was reasonably necessary to defend against that danger." (Italics added.)

The trial court also instructed the jury on imperfect self-defense, using CALCRIM No. 571, including that

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[7] Given the legal definition of rape (Pen. Code, § 261, subd. (a)), it was anatomically impossible for the victim to rape defendant. Obviously, however, defendant is using "rape" in a broader, colloquial sense that includes forcible sodomy and perhaps also forcible oral copulation.

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

". . . The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if:

"One, the defendant actually believed that he was in *imminent danger of being killed or suffering great bodily injury*; and

"Two, the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; but

"Three, at least one of those beliefs was unreasonable." (Italics added.)

Defense counsel asked the trial court to instruct on self-defense based on defense against rape. However, when the trial court replied, "I'm not going to include the word 'rape,'" defense counsel said, "I agree with that." The trial court then said, "Let's be clear. [¶] Are you requesting that I include the [w]ord 'rape'? Yes or no?" Defense counsel replied, "No, your Honor." The trial court concluded that it would not instruct on rape as a basis for self-defense, explaining, "I don't believe that . . . the defendant's reasonable belief that he was about to be raped is supported by substantial evidence."

Defense counsel did not ask the trial court to instruct on imperfect self-defense based on defense against rape.

B. *Discussion.*

Under the "perfect" self-defense doctrine, a person has the right to use deadly force to resist a forcible and atrocious felony, provided his or her belief in the need to do so is reasonable. (Pen. Code, § 197, subd. 1; *People v. Ceballos* (1974) 12 Cal.3d 470, 477-478.) Logically, then, under the imperfect self-defense doctrine, an *unreasonable* belief in the need to use deadly force to resist a forcible and atrocious felony can reduce murder to voluntary manslaughter. (Cf. *People v. Flannel* (1979) 25 Cal.3d 668, 679-680.)

At common law, forcible and atrocious felonies included rape as well as that "crime, of a still more detestable nature," committed by an "unnatural aggressor." (4 Blackstone's Commentaries (spec. ed. 1983) 181.) California cases similarly treat both forcible rape (*People v. Ceballos*, *supra*, 12 Cal.3d at p. 478; *People v. De Los Angeles* (1882) 61 Cal. 188, 190) and forcible sodomy (*People v. Collins* (1961) 189 Cal.App.2d 575, 589-593) as forcible and atrocious felonies as a matter of law.

"'A trial court's duty to instruct, sua sponte, on particular defenses arises "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'"' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1052.)

"An instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant

committed the lesser, uncharged offense but not the greater, charged offense. [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

Preliminarily, the People argue that defense counsel forfeited or invited the claimed error by saying that he was not asking the trial court to include the word "rape." Defendant also argues, however, that if his defense counsel did fail to preserve the issue for appeal, that failure constituted ineffective assistance of counsel. Accordingly, we must reach the issue, even if only under this rubric.

Here, there was no substantial evidence that defendant actually and subjectively believed that he needed to defend against a forcible sexual offense. To the contrary, he testified that he thought Navarrete was trying to hurt him. He was defending himself because he was "in fear for [his] physical safety[.]" He also testified:

"Q. Well, if you hadn't defended yourself —

"A. I would be dead."

Defendant specifically testified that, while he felt that Navarrete was going to harm him, he had no idea of what form that harm might take:

"Q. Did you feel that he was going to kill you?

"A. I didn't know what he was going to do to me . . . .

"Q. Well —

"A. I was scared. He was harming me in one way, shape, or form. He wasn't trying to be buddy[-]buddy with me.

"Q. When you say harming you, you felt he was going to do what to you?

"A. You know, I thought about different things that he might have been thinking, or that he just wanted to get something from me, or was he really trying to hurt me. I don't know what he was thinking."

Defendant stresses the following testimony:

"Q. You didn't think he was going to kill you, did you?

"A. Like I said, . . . I don't know that dude from anybody else. After that dude was talking about how he just got done taking from a little boy, his grandson, who am I to say he is not trying to take some booty from me?"

This was not a statement that he believed Navarrete was going to sexually assault him. He merely stated that he could *not* say that Navarrete was *not* going to sexually assault him. This was perfectly consistent with his previous testimony that he simply did not know exactly how Navarrete might harm him.

Defendant also repeatedly admitted that Navarrete's supposed confession to raping his grandson was *not* a factor:

"Q. It wasn't just because Leo . . . allegedly[] told you anything about having done something to his grandson? This was about a physical altercation between you and Leo?

"A. Right. Him talking about that wasn't what freaked me out and had me scared."

"Q. And I think you just said it, but I just want to be clear. This really doesn't have anything to do with what Leo told you about anything about his grandson. This has to do with the fact that he was a physical threat to you, correct?

"A. Well, yeah."

"Q. Just to be clear, . . . what you told us about Leo telling you about his grandson really doesn't have anything to do with why you hit him in the head with a rock?

"A. No.

"Q. Those are two separate issues, the issue with the grandson and the physical fight that you say you and Leo got into?

"A. I'd be lying if I said it wasn't on my mind. However, when he grabbed me, that was not what was on my mind. What was on my mind was, 'Get off me, [d]ude.'"

Taking defendant's testimony as a whole, his question as to whether Navarrete might have been "trying to take some booty" was sheer speculation. He admitted that he did not know Navarrete's actual motive. Defendant's own, actual, subjective fear was that Navarrete would hurt, injure, or kill him.[8]

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[8] To the extent that defendant's contention is aimed at the "perfect" self-defense instruction, there was also insufficient evidence that defendant's supposed belief was reasonable. According to defendant, Navarrete said he had raped his six-year-old grandson, said he wanted affection, and then grabbed defendant's shoulder. Even assuming this alleged conduct indicated some sexual intent, it did not indicate an intent to engage in penetrative sex, nor did it indicate an intent to use force. As the trial court pointed out: "You don't get to kill a guy who wants to kiss you, or fondle your genitals, or squeeze your butt." As a matter of law, no reasonable person in defendant's position would have expected a forcible, penetrative sexual attack at that point.

We therefore conclude that the trial court did not err by declining to instruct on a forcible sexual offense as the basis for either self-defense or imperfect self-defense. We further conclude that defense counsel did not render ineffective assistance by stating that he was not asking the trial court to give such an instruction.

III

UNDISCLOSED EVIDENCE THAT

DEFENDANT DID NOT SET FIRE TO THE VICTIM'S CAR

Defendant contends that the trial court erred by ruling that a police report, which supported defendant's testimony that he did not set fire to the victim's car, was neither newly discovered evidence nor *Brady* material.

A. *Additional Factual and Procedural Background.*

1. *Relevant trial proceedings.*

At trial, as already mentioned, there was evidence that on June 12, 2012, a police officer inspected the victim's car, which was parked at Nichols and El Toro. He found a red gas can on the driver's side floorboard. He also found fire damage to the interior.

Defendant admitted driving and abandoning the car, but he denied setting it on fire.

In closing argument, the prosecutor argued that defendant's denial that he set fire to the car did not make sense and meant that he was lying "again."

2. *The Marsden motion.*

After the jury returned its verdict, defendant brought a *Marsden* motion.

At the hearing on the motion, defendant mentioned a police report which stated that "an officer . . . did a check on that car . . . and reported [it] not having any burn damage . . . ." He added that he had received the police report from "parole," not from defense counsel. Both the prosecutor and defense counsel said that they were thitherto unaware of the police report.

The trial court denied the *Marsden* motion. The trial court observed, however, that there appeared to be a *Brady* issue.

3. *The motion for new trial*.

Before the next hearing, the People filed a brief arguing that there had been no *Brady* violation. It included a copy of the police report at issue, authored by Deputy Brian Keeney (Keeney report).

The Keeney report said that on June 11, 2012, Deputy Keeney had inspected a car parked at Nichols and El Toro: "The vehicle was unlocked and the keys were hanging from the ignition. I attempted to start the engine by turning the keys, but the engine did not turn over. I saw a small red gas can on the passenger side front seat and believed the vehicle had run out of gas and the owner had walked out of the area to get services for the vehicle. I did not see any signs of fire inside the vehicle . . . ." Deputy Keeney wrote the report on June 17, 2012, after learning during a briefing that the car was related to a missing persons investigation.

At the next hearing, defense counsel made an oral motion for a new trial based on newly discovered evidence. He conceded, "I don't see any Brady issues."

In opposition to the motion, the prosecutor called Deputy Keeney and Investigator Cornett.

Deputy Keeney confirmed that on June 11, 2012, he had inspected a car parked at Nichols and El Toro. He had noticed a "strong smell of gasoline." He had not noticed any signs of fire. However, if there had been fire damage to the roof, he would not have seen it. He leaned in and tried to start the car, but he never actually sat in it.

Investigator Cornett testified that he had been unaware of the Keeney report. It had not been associated with defendant's case because the space for a file number was blank. He also testified that most of the fire damage to the car was in the back seat roof area, although there were some burnt paper items on the passenger side floorboard.

Defense counsel conceded that defendant had had the Keeney report since some time prior to his parole revocation hearing on August 30, 2012. He also conceded again, "I don't see this at all as a Brady issue."

The trial court continued the hearing. The People then filed a supplemental brief arguing that a new trial was not warranted based on new evidence.

At the continued hearing, defense counsel stated, yet again, "I don't think it's a Brady issue . . . ."

After hearing further argument, the trial court ruled, "the Brady motion and the new trial motion are both denied . . . ." For purposes of *Brady*, it ruled that, while the prosecution did not suppress the evidence, it did fail to provide it. For purposes of the new trial motion, it ruled that the evidence was not newly discovered because it had been

in defendant's possession. Finally, for both purposes, it ruled that the evidence was not material, i.e., there was no reasonable probability that the result of the trial would have been different if the evidence had been disclosed.

B. *Defendant's Brady Claim.*

"Under the federal Constitution's due process clause, as interpreted by the high court in *Brady* . . . , the prosecution has a duty to disclose to a criminal defendant evidence that is "'both favorable to the defendant and material on either guilt or punishment.'" [Citations.]" (*In re Bacigalupo* (2012) 55 Cal.4th 312, 333.) "' . . . [T]he duty extends even to evidence known only to police investigators and not to the prosecutor [citation].' [Citation.]" (*People v. Lucas* (2014) 60 Cal.4th 153, 273, disapproved on unrelated grounds in *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.)

"'Evidence is "favorable" if it . . . helps the defense or hurts the prosecution, as by impeaching one of [the prosecution's] witnesses.' [Citation.] 'Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different."' [Citations.] Such a probability exists when the undisclosed evidence reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. [Citations.]" (*In re Miranda* (2008) 43 Cal.4th 541, 575.)

On appeal, "a *Brady* claim [citation] [is] subject to independent review. [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

The People "assume[] for the purposes of this argument" that defense counsel did not forfeit defendant's *Brady* claim, even though he disclaimed any reliance on *Brady*. This assumption is well-founded. The rationale for requiring an appellant to have raised an issue below is to give the trial court an opportunity to correct the error. (*People v. Scott* (1994) 9 Cal.4th 331, 351.) However, when, as here, the trial court has raised the issue on its own motion, it has had the necessary opportunity, and therefore the defendant can appropriately raise the issue on appeal. (*People v. Stitely* (2005) 35 Cal.4th 514, 537, fn. 12.)

The People do argue, however, that they had no duty to produce the evidence, because defendant already had it.

The California Supreme Court has stated that: "'Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then . . . the defendant has all that is necessary to ensure a fair trial . . . .' [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1134, italics omitted, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Consistent with this language, some federal courts have held that the prosecution has no duty to disclose information known to the defendant personally. (*United States v. Catone* (4th Cir. 2014) 769 F.3d 866, 872 [prosecution had no duty to disclose form that defendant had submitted to state department of labor]; *Boyd v. Commissioner, Alabama*

Dept. of Corrections (11th Cir. 2012) 697 F.3d 1320, 1335 [prosecution had no duty to disclose statement defendant himself made to police].)

Other federal courts, however, have distinguished between the defendant and defense counsel in this respect. For example, the Ninth Circuit has stated: "The availability of particular statements through the defendant himself does not negate the government's duty to disclose. [Citation.] Defendants often mistrust their counsel, and even defendants who cooperate with counsel cannot always remember all of the relevant facts or realize the legal importance of certain occurrences. [Citation.] Consequently, '[d]efense counsel is entitled to plan his trial strategy on the basis of full disclosure by the government regardless of the defendant's knowledge or memory of the disclosed statements.' [Citation.]" (*United States v. Howell* (9th Cir. 2000) 231 F.3d 615, 625; accord, *United States v. McElroy* (2d Cir. 1982) 697 F.2d 459, 465.)

We have not found any California case actually *holding* that the prosecution did not have any duty to disclose asserted *Brady* material because the *defendant* already had possession of it, even though defense counsel did not. The references in *Zambrano* and similar cases to evidence in the possession of "a defendant" were merely dictum in this respect. Because we have found no controlling state case law, and because the federal cases are in conflict, we choose not to resolve the *Brady* issue on this ground.

However, the People also argue that they had no duty to produce the evidence because it was not material. We agree.

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' [Citation.]" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.) To put it another way, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Id.* at p. 435, fn. omitted.)

Here, defendant admitted that he killed a 58-year-old man by hitting him with a rock. In his interview with Investigator Cornett, he did not claim he was in fear, and he did not assert self-defense. He admitted that he hit Navarrete "probably ten times." He also admitted that he continued to hit Navarrete even after he "was . . . slumped." Hence, the likelihood that the jury would find voluntary manslaughter rather than second degree murder was negligible.[9]

At trial, defendant claimed that he did tell Investigator Cornett that he acted in self-defense. However, the entire interview was recorded; the jury was made aware that the defense, as well as the prosecution, had access to the recording. If defendant had

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[9] At oral argument, defendant's counsel asserted that it is not significant that defendant did not raise self-defense before trial, as long as self-defense was at issue at trial. We agree that, as a matter of law, materiality must be evaluated in light of the issues raised at trial. Our point, however, is that the *jury* was aware, as a matter of *evidence*, that defendant never raised self-defense before trial. This hamstrung his credibility.

really told Investigator Cornett this, all his counsel had to do was play the relevant clip. Thus, the evidence showed that defendant never said in the interview that he acted in self-defense; indeed, it showed that defendant was lying on the stand about what he said in the interview. This was pretty much fatal to defendant's self-defense claim. Once the trial court took first degree murder off the table, it took the jury just 13 minutes to come to its verdict.

Defendant argues that the Keeney report was crucial because it would have supported his credibility; in its absence, the prosecutor was able to argue that defendant was lying when he said he did not burn the car, and hence that defendant was lying about everything else. As just noted, however, there was already virtually conclusive evidence that defendant was lying about what he said in the interview. The fact (at least as it appeared to the jury, in the absence of the Keeney report) that defendant was *also* lying about burning the car added little to this evidence.

In addition, the Keeney report did not conclusively prove that defendant did *not* burn the car. Investigator Cornett testified most of the fire damage was to the rear roof. Deputy Keeney testified that he leaned into the car, but he never actually sat in it; he would not have noticed any fire damage to the roof. Several photographs of the car, taken from the side with the doors open, failed to show the fire damage.

Finally, it was not very likely that a random person who came along and found an unlocked, inoperable car would choose to set fire to it (even if there was a can of gasoline

inside). It was far more likely that defendant — the person who admittedly killed Navarrete — would set fire to it to get rid of evidence.

We therefore conclude that the Keeney report was not material for purposes of *Brady*.

C. *Defendant's New Trial Motion.*

A motion for new trial may be based on newly discovered evidence. (Pen. Code, § 1181, subd. 8.)

"'In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: "'1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'" [Citations.]' [Citation.] 'In addition, "the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable." [Citation.]' [Citation.]" (*People v. Howard* (2010) 51 Cal.4th 15, 43.)

"""'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] '"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb

the ruling absent a manifest and unmistakable abuse of that discretion.'"' [Citation.]' [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.)

The trial court properly denied the new trial motion on the ground that the evidence was not newly discovered.

For purposes of a new trial, unlike for purposes of *Brady* (see part III.B, *ante*), it is clear that "[f]acts that are within the knowledge of the defendant at the time of trial are not newly discovered even though he did not make them known to his counsel until later . . . ." (*People v. Greenwood* (1957) 47 Cal.2d 819, 822.) For example, in *People v. Kelly* (1939) 32 Cal.App.2d 624, disapproved on other grounds in *People v. Vogel* (1956) 46 Cal.2d 798, 805, a bigamy case, the court held that the fact that the defendant's alleged first marriage was invalid was not newly discovered evidence because the defendant already knew this, even if his counsel did not. (*Id*. at p. 627.)

Defendant relies on *People v. Williams* (1962) 57 Cal.2d 263. There, the defendant brought a motion for new trial based on the testimony of three new witnesses — one whom he already knew about at the time of trial, and two others whom he learned about later through the first, undisclosed witness. (*Id*. at pp. 268-269.) The court held that the first witness's testimony was not newly discovered evidence; however, the other two witnesses' testimony was newly discovered. (*Id*. at p. 274.) It explained that even if the defendant had tried to interview the first witness, she was a "potentially hostile witness" who "did not want to testify"; thus, she would not necessarily have told him about the other two. (*Ibid*.) This simply means that the defendant there could not have

discovered the testimony of the other two witnesses by reasonable diligence. Here, by contrast, defendant already actually had the Keeney report.

Separately and alternatively, the trial court also properly denied the new trial motion because the evidence did not render a different result probable on a retrial. For all of the reasons already discussed in part III.B, *ante*, there was no reasonable probability that, even if the defense had had the Keeney report and had called Deputy Keeney, the outcome of the trial would have been any more favorable to defendant.

IV

THE ADMISSION OF PHOTOS OF NAVARRETE'S DEAD BODY

Defendant contends that his trial counsel rendered ineffective assistance by failing to object to the following exhibits, described by the court clerk as:

Exhibit 6: "Photo of decomposing body"

Exhibit 7: "Photo of decomposed body pulled out of bushes"

Exhibit 8: "Photo of rock with red substance . . ."

Exhibit 15: "Photo of top of skull"

Exhibit 16: "Photo of fragment of skull . . ."

Exhibit 17: "Photo of victim at Circle K . . ."

Exhibit 23: "Certified DMV photo of Leopoldo Navarrete"

"'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial,

i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.)

"'"'[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'"' [Citation.] 'In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.' [Citation.]" (*People v. Nguyen, supra,* 61 Cal.4th at p. 1051.)

"'"'"'The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion. [Citation.] "A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value."'"'" [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1215.)

Defendant's contention stumbles at the threshold because he has not provided us with an adequate record. He has not asked that the assertedly gruesome photos be included in the clerk's transcript. (See Cal. Rules of Court, rule 8.122(a)(3), (b)(3)(B).) He also has not asked that they be transmitted to us. (See Cal. Rules of Court, rule 8.224.) Even though "all exhibits . . . are deemed part of the record . . ." (Cal. Rules of Court, rule 8.122(a)(3)), we have no way of actually reviewing any exhibit unless it is physically provided to us via one of these routes. "It is axiomatic that it is the burden of

the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal." (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) Without seeing the photos, we can hardly say they were more prejudicial than probative, nor can we say it is reasonably probable that, if they had been excluded, the outcome would have been more favorable to defendant.

Separately and alternatively, we also reject defendant's contention for the following reasons.

Defendant never actually explains how either the photo of the rock or the two photos of the victim while still alive were more prejudicial than probative. Thus, he has forfeited his contention with respect to these photos. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

In any event, these photos were significantly probative. The rock corroborated defendant's admissions to Investigator Cornett; the apparent blood on it was crucial to show that it was most likely the murder weapon and not just some random rock. The driver's license photo was used to establish that witnesses were talking about the correct Leopoldo Navarrete. The Circle K photo was used to show that Navarrete was near the olive groves shortly before the murder. "[T]he possibility that a photograph will generate sympathy does not compel its exclusion if it is otherwise relevant. [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 331.) And there is no indication that any of these photos were particularly likely to stir the emotions. (See *People v. Suff* (2014) 58 Cal.4th 1013,

1072.) Thus, defense counsel could reasonably choose not to object to them. Even if he had objected, it is not reasonably likely that the objection would have been sustained.

The photos of Navarrete's dead body were likewise significantly probative. Indeed, "[a]utopsy photographs of a murder victim 'are always relevant at trial to prove how the crime occurred; the prosecution need not prove these details solely through witness testimony.' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 471.) Here, in particular, the prosecution used the decomposition to prove the approximate date of death and to explain why the number of blows to the head could not be determined at the autopsy. The injuries to the skull were relevant to establish cause of death. They were also relevant because they connected up with Murillo's testimony that defendant mentioned "scooping [someone's] brains out with [his] fingers like a spoon."

Defendant argues that none of these matters were "contested," given his admission that he killed Navarrete by hitting him with a rock. "But even so, the prosecution may still prove its case. Defendant cannot prevent the admission of relevant evidence by claiming not to dispute a fact the prosecution is required to prove beyond a reasonable doubt. The jury was entitled to learn that the physical evidence, including photographs, supports the prosecution's theory of the case. [Citation.]" (*People v. Rountree* (2013) 56 Cal.4th 823, 852.) We also note that the photos of the skull injuries, in particular, were relevant to the issue of intent to kill, which defendant did not concede. To the contrary, he testified that his intent was "to get the dude off me," implying that he lacked the intent to kill.

Defendant relies on *People v. Marsh* (1985) 175 Cal.App.3d 987, which held that it was error to admit gruesome autopsy photos to prove matters that were undisputed or already shown by other evidence (though it also held the error harmless). (*Id*. at pp. 996-999.) *Marsh*, however, was decided 30 years ago. More recently, as the People point out, in *People v. Booker* (2011) 51 Cal.4th 141, the "[d]efendant cite[d] a variety of cases, some more than 50 years old, for the proposition that a trial court can abuse its discretion by admitting particularly gruesome photographs." (*Id*. at p. 170.) The Supreme Court responded: "[C]ases of more recent vintage have recognized that photographs of murder victims are relevant to help prove how the charged crime occurred, and that in presenting the case a prosecutor is not limited to details provided by the testimony of live witnesses. [Citations.]" (*Ibid*.)

Turning to the other pan of the scale, it does not appear that these photos were unduly prejudicial. "'As [the Supreme Court] ha[s] previously noted, "'murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant.'"' [Citation.]" (*People v. Cunningham* (2015) 61 Cal.4th 609, 668.) At least from the testimony about the photos that is in the record, we cannot say that they were "of such a nature as to overcome the jury's rationality. [Citation.]" (*People v. Montes* (2014) 58 Cal.4th 809, 862.) Thus, again, defense counsel could reasonably choose not to object to them. Even if he had objected, it is not reasonably likely that the objection would have been sustained.

Last but not least, even if objections had been both raised and sustained, we see no reasonable likelihood that the outcome of the trial would have been any different. As already discussed, in part III.B, *ante*, the evidence of second degree murder was very strong, while the evidence of voluntary manslaughter was very weak. Moreover, the jury did not, out of passion and prejudice, simply rubber-stamp a verdict for the prosecution. It deliberated for two full days and part of an afternoon and sent out some 11 questions and requests before it deadlocked with respect to first degree murder. It came to a verdict quickly only after the first degree murder charge was dismissed, leaving the relatively cut-and-dried choice between second degree murder and voluntary manslaughter.

Hence, we reject the claim that defense counsel's failure to object to the photos constituted ineffective assistance.

V

THE APPLICATION OF PENAL CODE SECTION 654

Defendant contends that the imposition of separate and unstayed sentencing terms for the murder as well as on the deadly weapon enhancement violated Penal Code section 654 (section 654).

Section 654, subdivision (a), as relevant here, states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

As applied to crimes, "[s]ection 654 prohibits multiple punishment for a single physical act . . . ." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) "However, section 654 also applies to multiple convictions arising out of an 'indivisible' course of conduct committed pursuant to a single criminal intent or objective. [Citation.]" (*People v. Scott*, *supra*, 9 Cal.4th at p. 344, fn. 6.)

For a long time, it was unclear whether section 654 could apply to enhancements. (See generally *People v. Jones* (1993) 5 Cal.4th 1142, 1152; *People v. Akins* (1997) 56 Cal.App.4th 331, 337-338 [Fourth Dist., Div. Two].) In general, an enhancement can be classified as either a "status enhancement," which is based on the nature of the offender, or a "conduct enhancement," which is based on the nature of the offense. (*People v. Martinez* (2005) 132 Cal.App.4th 531, 535–536.) In *People v. Coronado* (1995) 12 Cal.4th 145, the Supreme Court held that section 654 does not apply to status enhancements at all. (*Coronado*, *supra*, at pp. 157–159.) However, in *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*), it held that section 654 can apply to two conduct enhancements. (*Ahmed*, *supra*, at p. 163.)

The court added that, when applying section 654 to two enhancements, "the analysis must be adjusted to account for the differing natures of substantive crimes and enhancements." (*Ahmed*, *supra*, 53 Cal.4th at p. 160.) "Provisions describing substantive crimes . . . generally define criminal *acts*. But enhancement provisions do not define criminal acts; rather, they increase the punishment for those acts. They focus on *aspects* of the criminal act that are not always present and that warrant additional

punishment. [Citations.]" (*Id*. at p. 163, fn. omitted.) "Thus, when applied to multiple enhancements for a single crime, section 654 bars multiple punishment for the same *aspect* of a criminal act." (*Id*. at p. 164.)

Finally, the court cautioned that: "Often the sentencing statutes themselves will supply the answer whether multiple enhancements can be imposed. . . . When this is the situation, recourse to section 654 will be unnecessary because a specific statute prevails over a more general one relating to the same subject. [Citation.] The court should simply apply the answer found in the specific statutes and not consider the more general section 654. [¶] Only if the specific statutes do not provide the answer should the court turn to section 654." (*Ahmed*, *supra*, 53 Cal.4th at p. 163.)

Again, *Ahmed* dealt with the application of section 654 to two conduct enhancements. It did not deal with the application of section 654 to a conduct enhancement and a *crime*. Lower courts, however, have held that section 654 can bar multiple punishment for a conduct enhancement and for a crime *other than the crime underlying the conduct enhancement*. (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1218-1221 (*Wynn*); *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1392-1396 [Fourth Dist., Div. Two]; see also *People v. Calles* (2012) 209 Cal.App.4th 1200, 1217, 1220, 1225; *People v. Louie* (2012) 203 Cal.App.4th 388, 400-401 [conc. opn. of Nicholson, J., joined by Hoch, J.].)

For example, in *Wynn*, the defendant was convicted of (among other things):

1. Burglary (Pen. Code, § 459), with a deadly and dangerous weapon enhancement (Pen. Code, § 12022, subd. (b)(1)); and

2. Three counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). (*People v. Wynn*, *supra*, 184 Cal.App.4th at p. 1214.)

The appellate court held that section 654 prohibited punishment for the assault with a deadly weapon counts, on one hand, and the deadly and dangerous weapon enhancement, on the other hand. (*People v. Wynn*, *supra*, 184 Cal.App.4th at pp. 1218-1221.) It explained: "[T]he enhancement . . . for personally using a deadly or dangerous weapon during the commission of the burglary is based on an *act or omission* performed by Wynn during the offense . . . ." (*Id*. at p. 1220.) However, it also stated: "We stress that our decision is limited to the particular circumstances of this case. We address only whether section 654 applies to an enhancement for personally using a deadly or dangerous weapon during a crime . . . when the defendant is also convicted of *a separate crime* that arises out of the defendant's use of that deadly or dangerous weapon." (*Id*. at p. 1221, italics added.)

By contrast, we are not aware of *any* case holding that section 654 can bar punishment for both an enhancement and the *underlying crime*. Certainly defendant does not cite any.

To the contrary, *People v. Chaffer* (2003) 111 Cal.App.4th 1037 held that multiple punishment for a great bodily injury enhancement (Pen. Code, § 12022.7) and for the underlying offense of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd.

(a)) did not violate section 654. (*Chaffer*, *supra*, at pp. 1039-1041, 1044.) The court reasoned that Penal Code section 12022.7 overrides section 654. (*Chaffer*, *supra*, at pp. 1045-1046.) It explained:

"Section 12022.7 is a narrowly crafted statute intended to apply to a specific category of conduct. It represents 'a legislative attempt to punish more severely those crimes that actually result in great bodily injury.' [Citations.] The Legislature has elected to impose such specific enhancements in part 'because of the nature of the offense at the time the offense was committed . . . .' [Citation.] [¶] . . . [¶]

"Where statutes are in conflict, it is well-settled that '"'a general [statutory] provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.'"' [Citations.]

"We therefore presume that the specific statute controls and operates as an implied exception to section 654. [Citations.]" (*People v. Chaffer*, *supra*, at pp. 1045-1046.)[10]

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10 *Chaffer* also reasoned that: "If we were to apply the general provisions of section 654 to the more specific [great bodily injury] enhancement, it would nullify section 12022.7, because the enhancement and underlying offense *always* involve the same act." (*People v. Chaffer*, *supra*, at p. 1045.)

After *Chaffer* was decided, however, *Ahmed* declared that, in applying section 654 to enhancements, a court must look at whether they apply to the same *aspect* of a criminal act.

[footnote continued on next page]

More recently, *People v. Calderon* (2013) 214 Cal.App.4th 656 held that multiple punishment for a deadly and dangerous weapon enhancement (Pen. Code, § 12022, subd. (b)(2))[11] as well as for the underlying offense of carjacking (Pen. Code, § 215, subd. (a)) did not violate section 654. (*Calderon*, *supra*, at pp. 661-665.) Following *Chaffer*, it reasoned that Penal Code section 12022, subdivision (b)(2) overrides section 654: "Section 12022, subdivision (b)(2) . . . is designed to punish a specific category of conduct, use of a deadly or dangerous weapon during a carjacking. Carjacking requires the use of force or fear, but does not require use of a dangerous or deadly weapon. [Citations.] Use of a deadly or dangerous weapon makes carjackings more lethal than they would otherwise be. Section 12022, subdivision (b)[(2)], like the statute at issue in *Chaffer*, is a narrowly crafted statute intended to apply to a specific category of conduct, and represents a legislative attempt to punish more severely those carjackings in which a deadly or dangerous weapon is used. It therefore operates as an implied exception to the more general statute, section 654. [Citation.]" (*Calderon*, *supra*, at pp. 664-665.)

[footnote continued from previous page]

In the wake of *Ahmed*, it is not so clear that applying section 654 to an offense and to a great bodily injury enhancement to that offense would necessarily "nullify" the enhancement. For example, we would guess that it would not prohibit punishment for both assault with a firearm (Pen. Code, § 245, subd. (a)(2)) and a great bodily injury enhancement, because these do not punish the same aspect of the criminal act.

11 The deadly or dangerous weapon enhancement under Penal Code section 12022, subdivision (b)(2) that was involved in *Calderon* is identical to a deadly or dangerous weapon enhancement under Penal Code section 12022, subdivision (b)(1) that is involved here, except that it applies only to carjacking and it gives the trial court discretion to impose a longer period of imprisonment.

We agree with the reasoning in *Chaffer* and *Calderon*. Like the enhancements in those cases, Penal Code section 12022, subdivision (b)(1) is a narrowly crafted statute intended to apply to a specific category of conduct. It represents a legislative attempt to punish more severely those crimes that are committed by means of a deadly or dangerous weapon. Thus, it represents an implied exception to section 654 as it would otherwise apply to the enhancement and the underlying offense.

It is also significant that Penal Code section 12022, subdivision (b)(1) expressly provides that "[a] person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by *an additional and consecutive term of imprisonment* in the state prison for one year, *unless use of a deadly or dangerous weapon is an element of that offense*." (Italics added.) If Penal Code section 12022, subdivision (b)(1) did *not* override section 654, this exception would be unnecessary; *whenever* use of a deadly or dangerous weapon is an element of the underlying offense, section 654 would bar punishment for the deadly or dangerous weapon enhancement by its own force. "It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage. [Citations.]" (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038-1039.) Thus — implicitly, but necessarily — the Legislature intended Penal Code section 12022, subdivision (b)(1) to override section 654.

Finally, we note that there is an argument that *every* enhancement provision precludes the application of section 654 to the enhancement and the underlying offense. Like Penal Code section 12022, subdivision (b)(1), most (if not all) enhancement provisions require the imposition of the enhancement as "an additional and consecutive term of imprisonment" (or words to that effect). Moreover, Penal Code section 1170.1, subdivision (d), as relevant here, provides that: "When the court imposes a sentence for a felony . . . , the court shall also impose, *in addition and consecutive to the offense of which the person has been convicted*, the additional terms provided for any applicable enhancements." (Italics added.) Admittedly, a provision that the court "shall impose" or that the defendant "shall be punished" by the enhancement or enhancements is insufficient to override section 654. (See *People v. Calles*, *supra*, 209 Cal.App.4th at pp. 1220-1221, 1225.) However, it would seem that a more specific provision that the court shall impose such enhancements "in addition and consecutive to the offense of which the person has been convicted" *does* override section 654.

Here, Penal Code section 12022, subdivision (b)(1) is clearly intended to override section 654, even without regard to its "additional and consecutive term of imprisonment" wording. Thus, we need not decide whether this wording alone is sufficient to override section 654 as applied to this and other enhancements vis á vis their underlying offenses.

We therefore conclude that the trial court did not err by imposing unstayed sentencing terms on both the murder and the deadly weapon enhancement.

VI

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

KING
J.

MILLER
J.